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*Federal Communications Commission
Office of Secretary*

November 25, 1996

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**Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554**

**re: Advanced Television Systems and Their Impact upon the Existing Television
Broadcast Service, MM Docket No. 87-268**

Dear Mr. Caton:

**Please find enclosed the joint Comments of J B Broadcasting, Inc., Faith Branch,
Melissa Harnett, Charles R. Meeker, Joan Primm, and U.S.A. Software, Inc. in the
above referenced matter.**

**We note that the comment period closed on November 22, 1996. Please accept these
comments as timely filed pursuant to the public notice released November 21, 1996
which permits comments to be filed within a reasonable time after the close of the filing
window.**

**In addition to the original, we have provided nine copies. Please stamp the file stamped
copy enclosed herewith.**

Please contact the undersigned if you have any questions.

Very truly yours,

James L. Primm

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

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Federal Communications Commission
Office of Secretary

MM Docket No. 87-268

**COMMENTS OF J B BROADCASTING, INC., FAITH BRANCH, MELISSA HARNETT,
CHARLES R. MEEKER, JOAN PRIMM, AND U.S.A. SOFTWARE, INC.**

J B Broadcasting, Inc., which provides technical and support services to the low power television ("LPTV") industry, Faith Branch, permittee of K07WD, Reedley, CA and K10OC, Reedley, CA; Melissa Harnett, permittee of K08MD, Arroyo Grande, CA, K10OG, Lompoc, CA, K17EF, Lompoc, CA, K43FA, Lompoc, CA, and K51FF, Lompoc, CA; Charles R. Meeker, permittee of K45ET, Cathedral City, CA, K58FJ, Cathedral City, and K07WA, Templeton, CA, and applicant for BPTTL-940415N3 in Cathedral City and 960517KZ in Cathedral City; Joan E. Primm, permittee of K30FD, Santa Maria, CA, K35ER, Santa Maria, CA, K56FW, and K62EZ, Santa Maria, CA; and U.S.A. Software, Inc., permittee of K13XK, Reedley, CA, K10OI, Templeton, CA, K19EF, Templeton, CA, K21EX, Templeton, CA, and K23ED, Templeton, CA (collectively "JB") by their attorney, hereby respectfully submit the following joint comments in response to the Commission's Sixth Further Notice of Proposed Rule Making ("SFNPRM") in the above entitled rule making, 96-317, released August 14, 1996.

I. Introduction and Summary

Low power television provides unique local programming in television markets throughout the United States. For example, in Santa Maria, Joan Primm is currently negotiating with programming suppliers to provide Spanish language music television to that market. This will provide a useful entertainment service to a community with close to a 40% Hispanic population. This type of programming is not available through any other means in the community (such as cable, satellite or MMDS).

Many low power stations are also becoming affiliates of major television networks. Such network programming would not otherwise be available over-the-air in many markets. The network programming may serve as the backbone for the development of quality local programming, such as news, local sports and local interview shows.

JB believes that the core spectrum approach advocated by the Commission will reduce the diversity of local programming available to viewers by causing the loss of many low power television ("LPTV") stations. LPTV is one of the only means by which a local group or individual may reach the public on a cost-effective basis with local issues and concerns. In the event that the Commission does elect to utilize its core spectrum approach, it should set aside channels 52 - 59 for use by displaced LPTV stations.

If an LPTV station is displaced, it should be able to relocate to a new channel and to a new transmitter site if necessary, within its DMA or a 64.4 km radius of its then current transmitter site. DTV stations and new services that displace LPTV operations should be required to pay the reasonable out of pocket costs of relocating or losing its

operation. DTV stations that displace LPTV operations should be required, at the option of the LPTV operator, to carry the LPTV channel on the ATSC DTV multiple channel feature of the DTV system.

The Commission must permit LPTV operators to obtain DTV channels within their market on a preferred basis to new entrants. Such an approach is not violative of the Ashbacker doctrine (Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)).

II. The Core Spectrum Approach Will Result In a Loss Of Local Television Service and Will Further Reduce the Diversity of Local Programming Available To Viewers

A. The Commission Proposes to Eliminate Channels 2-6 and 51-69. The Commission proposes to move all broadcast television channels into a core band between 7 and 51, with the resulting loss of channels 2-6 and 52-69. In addition to full power stations, many low power television stations are located on these channels. The so-called non-core channels are the channels where growth of local television stations can be expected in the future.

B. There Are Already Insufficient Channels, Even In Small Markets. In many markets, the only options for new low power television stations lie in the channels above 51. For example, in a recent filing window for major modifications, Charles Meeker sought to change his city of license from Cathedral City to a new site near Indio. Indio is part of the Palm Springs television market which is a small television market of about 100,000 households and is DMA number 164. An engineering study revealed that the only channel available, using the Commission's current allotment procedures, was channel 63.

Although anecdotal, the above example illustrates the fact that even in small markets there are already insufficient channels available in the core band for the number of broadcasters who wish to provide service. The Commission's proposal will only serve to exacerbate this problem and cause the loss of a multitude of local voices.

C. The Commission's Proposal Threatens Diversity of View Points.

Diversity of view points is severely threatened by the Commission's proposal to reduce the total amount of spectrum available for television stations. Low power television stations provide one of the few possibilities for small businesses, women and minorities to offer programming that may be made widely available to the public on a cost-effective basis.

Low power television stations may now be constructed for less than \$150,000, including transmission and studio equipment. High tech studios, using equipment that only ten years ago would have been out of the reach of even most large broadcasters, is now readily available at very affordable prices.¹ This puts high quality television production within the reach of many individuals and groups within a community who may wish to provide local programming.

The new satellite services, such as DirecTV and PrimeStar, will not provide local programming in the foreseeable future. This is due in part to continued limited transponder space and the relatively high cost of providing uplink service for most local stations. Los Angeles Times, November 12, 1996. In addition, cable systems are

¹For example, a high quality 1 kW solid state transmitter from ITS lists for about \$40,000; an 8 bay television antenna manufactured by S.W.R. lists for about \$9,000; the new generation of Panasonic digital cameras for consumer/professional use (with 3 CCD color) lists for \$4,199 (model PVDV1000); the Post Box non-linear editing system by Panasonic which provides almost all needed post-production activities and special effects lists for \$49,000.

generally full and when they add channels they normally add only national cable channels or pay-per-view programming in order to maximize revenue. To the extent cable systems provide local public access channels, they rarely provide the type of high quality local programming that most viewers have come to expect from commercial channels. Los Angeles Times, September 15, 1996. In addition, the Commission must not be misled to believe that the plethora of national cable channels now available increases the diversity of voices at the local level. Due to the large cost of starting a cable channel (sometimes in excess of 100 million dollars), they must provide programming of a nationwide interest in order to attract high paying national advertisers. Broadcasting & Cable, September 9, 1996.²

D. Set Aside of Frequencies Between Channels 52 and 59. In the event that the Commission adopts its core approach, JB encourages the Commission to set aside certain channels specifically for displaced LPTV stations, such as between 52 and 59. Such assignments should be done on a primary, not a secondary basis so that LPTV operators could operate with confidence in the future that the channels on which they broadcast will not change. LPTV broadcasters should be permitted to operate either on an analog or digital basis on those channels.

II. Replacement of LPTV Channels

A. Replacement of Channels Should Be Permitted Anywhere within a

²The Internet is not a current viable option for local groups which may wish to provide local "programming" and may not be for a number of years. The cost of building and maintaining an Internet site is already estimated to be \$1,000,000. Broadcasting and Cable, October 28, 1996. Although the cost of building the Internet site is expected to drop in the next several years, the expense of maintaining such a site will probably escalate as the public comes to expect more consistent updates and higher quality graphics. It also remains unclear if advertiser supported sites will be economically viable on a mass scale. As a result, Internet sites may become more the purview of large companies which they will use to promote their own products and services. In addition, only 24% of American households even have a computer with a modem. Although expected to increase, it is not clear that the computer will ever become as pervasive in the American household as the television set. USA Today, October, 1996.

Television DMA or Within 64.4 Km of the Current Allotment. JB agrees with the Commission's proposal that displaced LPTV station operators should be able to apply for a suitable replacement channel in the same area without being subject to competing applications. JB proposes that "area" be defined as the same television Nielsen DMA or an area within 64.4 kilometers of a station's current transmitter site. This definition of area is generally in keeping with current Commission transmitter relocation criteria. See FCC Public Notice 62033, released March 18, 1996.

B. DTV Stations Should Not Be Deemed Operational Unless They Will Provide Service on a Minimum 12 Hour Per Day Basis. The LPTV station should have the option to move to a new channel at any time after reasonable expectation of displacement occurs. JB agrees with the Commission that an LPTV station should have the option to continue to use a channel until a displacing DTV station or a new primary service provider is operational. DTV or new service providers should not be permitted to become operational and cause the displacement of LPTV operators without providing service on at least a 12 hour per day basis. In this way, displacement of important local programming will not be caused merely so that a DTV station or new service provider may conduct one or two hour tests over a period of months or even years.

C. Compensation of LPTV Stations Required to Move To Another Channel. JB agrees with the Commission's proposal that would permit LPTV operations on channels outside the core digital TV spectrum in the event that the Commission adopts the core spectrum proposal.

Any party that causes displacement of an LPTV station should compensate the

LPTV licensee or permittee for the cost of its investment if a new channel cannot be found. If a new channel is available, the LPTV stations should be paid its reasonable out-of-pocket costs for its move by the displacing party. Compensating parties should include displacements caused by DTV stations and any new service providers.

The public interest demands that DTV stations provide compensation to LPTV stations as well as new service providers regardless of the status of LPTV as a secondary service. Given the public service benefits provided by LPTV stations, and the Commission's own recognition that they are usually somewhat undercapitalized (see SNPRM at Appendix C, C-5), this will help to provide a smooth and fast transition to a new channel and/or new site as may be necessary. It will also help to minimize the disruption of local service that is likely to occur from such a transition. The assurance that any loss of equipment will be compensated for by the displacing party, whether DTV or some other, may also make it possible for low power television stations to obtain financing to continue to build facilities over the next several months while the FCC determines the final table of allotments. The uncertainty caused by possible channel losses makes financing very difficult for the small businesses that often own LPTV stations .

C. Carriage of LPTV Stations on DTV Systems. We propose that DTV stations that are displacing LPTV stations be required to carry the LPTV station through the ATSC DTV system's multiple programming capability. In the event that an LPTV station will be displaced (whether or not a new channel is available in the same market), the LPTV station should have the option to obtain carriage through the DTV system's multiple programming capability. The LPTV station would be required to give notice

when there is a reasonable expectation of displacement that it wishes such carriage.

The costs associated with such carriage would be borne by the DTV station in lieu of having to compensate the LPTV station for its move or loss of service.

D. Terrain Shielding and Other Appropriate Engineering Factors Should Be Taken Into Account When Finding Replacement Channels. J B agrees with the

Commission's proposal that any low power operation that is adversely affected by the implementation of DTV or its spectrum recovery efforts should be permitted to take into account terrain and all other appropriate engineering factors in finding replacement channels.

III. Primary Use of DTV Channels by LPTV Stations

A. During Transition Period. After the final table of allotments is prepared, a window filing period should be opened so that any vacant allotments for full service facilities may be sought on a primary basis by LPTV stations operating in the market. In the event that there are two or more applicants for the same channel, channels should be allocated based on a lottery proceeding. Lotteries have been used successfully in LPTV proceedings and LPTV applicants are generally comfortable with lotteries and believe that they offer a fair means of awarding broadcast licenses. No preferences should be granted for the lottery. LPTV licensees should be permitted to settle out of a lottery by agreeing to multiplex their signals.

Once all possible full service stations have been granted, if any, remaining LPTV stations should be permitted to convert their LPTV operation to a DTV facility, provided that their coverage replicates the coverage provided by their LPTV operations. These

operations would be operated on a secondary basis, except to the extent that the Commission sets aside specified spectrum for certain LPTV channels, such as channels 52 to 59 (see discussion above).

B. Post-Transition Period. After final decisions have been made by full service stations as to which channel they will select for DTV operation, the Commission should create a final post-transition table of allotments. Based on this table, additional channels will become available for full service DTV stations as NTSC channels are relinquished. A window filing period may then be opened during which LPTV applicants would be given first choice for such post-transition DTV operations within their existing markets. If there are two or more LPTV applicants for the same channel, a lottery should be held to determine the permittee of such channel.

This procedure of giving existing broadcasters an exclusive right to apply for an alternate channel in the same service in order that they may better serve the public interest is well established and is not precluded by Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In Ashbacker the Supreme Court held that the Commission is required under Section 309 of the Communications Act to consider all bona fide mutually exclusive applications. The Commission may, however, establish threshold qualifications that must be met before applicants are entitled to comparative consideration. The Commission may therefore establish, consistent with Ashbacker, that an applicant must be an LPTV operator in order to qualify for a DTV license during a preferential window. (See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Review of the Technical Assignment Criteria for the AM Broadcast Service, 69

RR 2d 1395, 1415 n. 47 (1991), recon granted in part and denied in part, FCC 93-198 (adopted April 13, 1993) ("AM R&O").

The AM R&O presented virtually the same issues as are presented in our proposal of granting LPTV stations the right to migrate to a DTV facility without competition from new broadcast entrants. Certain AM operators were permitted to migrate to a new frequency and begin operating full time without competition from new broadcast entrants. AM operators share many of the same characteristics as LPTV operators including: (i) commitment to providing strong local programming, (ii) ownership largely in the hands of small and medium sized operators and (iii) both LPTV and AM operators are disadvantaged because they must operate in a crowded band with interference possibilities. The public interest therefore demands that LPTV stations be granted an exclusive opportunity to obtain DTV stations within their markets, just as AM operators were permitted the right to migrate to the expanded AM band without competition from new entrants.

Further, the Commission can "promulgate rules limiting eligibility for a newly allotted channel when such action promotes the public interest, convenience and necessity." Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4873 (1989) (Commission promulgated rules permitting radio and television licensees and permittees to change city of license without permitting the filing of competing applications). The public interest will be served because low power television stations in the same market will be able to improve their facilities so as to provide their programming on an equal basis to their competitors, and to no longer be subjected to

interference or even loss of their license from a primary user. To the extent possible, the Commission should avoid creating an underclass of LPTV broadcasters when spectrum is available and LPTV operators who are already on the air have demonstrated their commitment to serving the public in their communities.

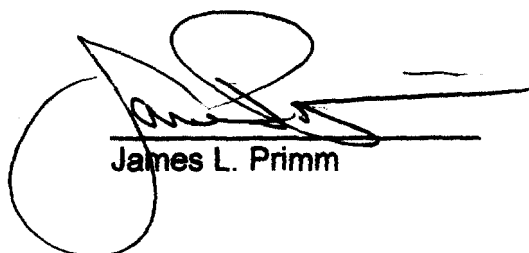
IV. Conclusion

LPTV stations provide exceptional local service to the public which may not otherwise be available. To continue to encourage LPTV operations, the Commission is correct in permitting LPTV operators maximum latitude in establishing facilities that will not interfere with new DTV or existing NTSC operations. The Commission should permit LPTV operators to seek available DTV channels in advance of opening such channels to new entrants. This will work to encourage continued operation by LPTV operators at their maximum service level.

Respectfully submitted,

November 25, 1996

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A handwritten signature in black ink, appearing to read 'James L. Primm', is written over a horizontal line. To the left of the signature is a large, hand-drawn circle.

James L. Primm

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J B Broadcasting, Inc.
Faith Branch
Melissa Harnett
Charles Meeker
U.S.A. Software, Inc.